ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Amendment of Rules and Policies Governing Pole Attachments	CS Docket No. 97-98

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, *ET AL.*

National Cable Television Association

Cable Telecommunications Association
Texas Cable & Telecommunications Association
Cable Television Association of Georgia
South Carolina Cable Television Association
Cable Television Association of Maryland, Delaware and the District of Columbia
Mississippi Cable Telecommunications Association
Mid-America Cable Telecommunications Association
Kansas Cable Telecommunications Association

Jones Intercable, Inc.
Charter Communications
Greater Media, Inc.
Prime Cable
Rifkin & Associates
TCA Cable TV, Inc.
The Helicon Corporation

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SUMMARY

Now that many electric utilities are actively competing in the communications business, many of these utilities seek to increase pole rental rates (and other pole-related costs). A similar pattern of conduct led to the original passage of the Pole Attachment Act.

The clarity and certainty of the current formula, developed and refined since the passage of the Pole Act in 1978 through numerous rulemaking and hundreds of litigated cases before this Commission, has established the clear parameters of just and reasonable pole attachment rates. These parameters allows utility pole owners and unaffiliated attaching parties to collaborate in resolving the overwhelming majority of pole attachment rate matters without Commission involvement. The FCC's formula has been validated repeatedly in court, in Congress, and through its wholesale adoption by many States—including California, Ohio, Michigan and New York—that have certified their independent jurisdiction over pole attachments, yet have followed the FCC approach.

The utilities seek to alter the fundamental design of the pole attachment formula, by renewing arguments which have been rejected in the past. These Comments show that usable space on utility poles is increasing, not decreasing as the utilities claim. We show, furthermore, that there is no basis to remove 30' poles from rate base, because the utilities' continuing property records, independent surveys and cable operators' experience shows that such poles remain in wide use. Similarly, we show that there is no basis to include the costs of electric utility pole grounding systems in rate base, a view with which State regulators have specifically concurred and which is confirmed by the accounting rules of the Federal Energy Regulatory Commission.

We agree with the Commission's proposal to alter the pole attachment formula's

treatment of the depreciation reserve in circumstances where the pole reserve accounts exceed the pole asset accounts. The Commission's proposal strikes the appropriate balance between maintaining consistency with the current formula, and preventing utility recovery of a return on zero-cost capital contributed by customers.

We urge the Commission not to include additional Part 32 accounts to the administrative and maintenance components of the carrying charges. We show that even if one-to-one mapping from Part 31 to Part 32 accounting were feasible, it does not represent sound regulatory policy or economic principles. The current method of calculating these carrying charge elements more than recovers the appropriate expenses associated with the maintenance and administration of pole plant. Adding supplemental accounts would exceed expenses that were allowed under Part 31; would import cost items that have no conceivable nexus to the maintenance and administration of the pole resource; and would double charge for costs already recovered in makeready and inspection fees. We likewise show that FERC Account 590 should not be added to the maintenance charge for electric utility pole attachment rates.

Finally, we urge the Commission to adopt the approach to the calculation of conduit occupancy rates that was set forth in *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.* In addition, we show that modern underground construction practices and the economics of underground duct systems support adoption of a quarter-duct methodology, under which a cable operator or other duct occupant is presumed to occupy one-fourth of the capacity of a single duct.

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The National Cable Television Association, Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation respectfully submit these Comments in the above-captioned rulemaking proceeding.

As set forth in detail below, because of the extensive and important benefits that the current pole attachment formula has generated in advancement of facilities-based competition, there is a weighty presumption ***against*** making adjustments to the formula which has evolved over the nearly twenty years of pole attachment regulation. The Commission seeks comment on a variety of issues which the utilities have attempted unsuccessfully time and again to reverse legislatively, and before this Commission, most recently through the special advocacy contained in their so-called August 28, 1996 "White Paper." These matters range from presumptions of pole space allocations, to the inclusion of grounding systems in rate base, to including new and

unjustified subaccounts in the carrying charge calculations. We respectfully request that the Commission review these proposals with great skepticism, and, to the extent that any changes at all are made to the formula, they be made consistent with these Comments.

I. THERE IS A WEIGHTY PRESUMPTION IN FAVOR OF RETAINING THE CURRENT FORMULA

The Pole Attachment Act was passed in 1978 to fill the urgent need for a forum for the simple and expeditious adjudication of cable television access and rate disputes. As the Commission knows well, cable operators are required by local franchise, environmental and zoning laws, and business realities, to make use of existing utility poles.[1] Cable operators seeking to attach coaxial facilities to those poles had been subjected to refusals, delays, overcharges, and other abuses by pole owners who feared the potential facilities-based competition.[2] Negotiation failed: State PUCs were unwilling to intervene. Antitrust litigation took over a decade. The FCC held itself powerless to address the problem more swiftly.[3]

Congress responded with the Pole Act, and an explicit mandate that the FCC provide a readily available forum for the "simple and expeditious" resolution of pole complaints.[4]

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[1] *See, e.g., Better TV, Inc.*, 31 F.C.C.2d 939, 956 (1971); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

[2] *See, e.g., Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. (1977) (hereinafter *1977 S. Comm.*). *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2*, 94th Cong. (1976) (hereinafter *1976 Oversight*); *Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce*, 94th Cong. (1976) (hereinafter *1976 H. Comm.*).

[3] 1977 S. Comm. at 27. *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. 1981). California Water and Tel. Co., 40 F.C.C.2d 1138 (1973).

[4] S. Rep. No. 95-580, at 21 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 129.

The Commission has largely afforded that forum, and has strived since its first rulemaking to craft a rate formula which serves the overarching purposes of the Act: simplicity; expedition; fair compensation to pole owners; and sufficient clarity to promote consistent settlements without recourse to FCC complaints for each of the hundreds of pole contracts and pole rent rate calculations reviewed annually.

Before we review the specific proposals which have been advanced by certain electric utilities and telephone companies, it is essential to understand just how well the current formula has operated. Then, we submit, it will become clear that many of the proposals by the utilities are not so much fine tuning as part of a nationwide effort to derail the ability of cable operators and CLECs to avail themselves of the best remedy for pole abuses.

A. The Formula Continues To Establish The Clear Parameters Of Just And Reasonable Pole Attachment Rates

First, the Commission's formula has been clear. It has evolved through four major rulemakings and hundreds of litigated cases which have tested and refined the intricacies of the formula adopted by rule. It has survived challenges raised in court and in Congress, some on the very issues that the electric utilities seek to put into play, yet again. The formula relies nearly exclusively on publicly available information, with a backstop of pre-complaint discovery for any information which is not available from the annual reports routinely prepared by the pole owners. Pole proceedings have been specifically designed to be simple, expeditious three-pleading affairs[5] to resolve disputes with a minimum of paperwork, without discovery and

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[5] The rules authorize a complaint, a response by the party subject to the complaint, and a reply by the initial complainant. 47 C.F.R. § 1.1407. "Except as otherwise provided in [Rule] § 1.1403, no other filings and no motions other than for extension of time will be considered unless authorized by the Commission." 47 C.F.R. § 1.1407. The Commission established this three-pleading system, again, in response to Congress' direction that the FCC create a "simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paper work and

without live testimony.[6] The reliance on such a regime has created enormous benefits.

For nearly 20 years, reliance on publicly available information has allowed utility pole owners and attaching parties to resolve hundreds of rate issues on their own without Commission involvement. The typical pole attachment agreement permits the rates to be recalculated annually to reflect the most recently filed cost information. But neither the utilities nor cable operators come to the FCC annually to check those calculations. Instead, the industries have established comprehensive private review mechanisms which apply the FCC's formula to current data, and resolve almost all disputes without agency intervention.

For example, the Texas Cable & Telecommunications Association ("Texas Association"), while not always able to resolve all differences informally, routinely resolves rates and term disagreements with Southwestern Electric Power Company, Southwestern Bell Telephone, Central Power and Light Company, West Texas Utilities, and even Texas Utilities.

The Cable Television Association of Georgia ("Georgia Association") reviews the annual rate calculations of Georgia Power and BellSouth. The Cable Television Association of Maryland, Delaware, and the District of Columbia, and the West Virginia Cable Television Association do the same with utilities in their respective jurisdictions. Because cable operators and utility pole owners alike are on clear notice as to the existence and workings of the formula, the utility simply calculates the new rate using the formula. There is frequently no need even

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procedures consistent with fair and efficient regulation," which, as shown more fully below, the utilities seek to decimate through their multi-front attack on pole regulation.

[6] In a somewhat recent development, the Cable Services Bureau ("Bureau") recently has referred a select number of pole attachment cases to ALJs to complete specific calculations, after Bureau Staff has resolved the primary substantive issues. In all such cases, the parties were able to resolve the final calculations themselves and no hearing or final ALJ decision was required. *See, e.g., Multimedia Cablevision, Inc., v. Southwestern Bell Telephone*, 11 F.C.C.R. 11,202 (1996). Such procedures should be used sparingly, because in each case the Hearing Designation Order led to additional pleadings and delays in cases which could have been resolved on the pleadings.

for extensive consultation between the pole owner and the cable operator. What makes the process work is the clarity of the current formula, its reliance on data which ties to FERC Form 1 and ARMIS reports, and the confidence of the parties that errors would be swiftly adjudicated at the FCC. The regulatory regime does not reward obfuscation, delay, or overreaching in the calculation of pole rents—so long as the Commission stays true to a commitment to prompt resolution based on such public data.

The benefits are most vivid in the case of small cable operators. Small operators are peculiarly vulnerable to pole rent overcharges, because of the nature of their service areas. The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators.[7] A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers. A pole rent increase creates an enormous push on rates, and frequently makes rural line extensions uneconomical. These same small operators are often the very parties without the budgets to litigate expensive document-intensive rate cases. Indeed, there is an instructive lesson from an important pole attachment antitrust case brought before the 1978 Pole Act. One small cable operator, Aberdeen Cable, prevailed in its Sherman Act claims against pole abuses, but by the end of the 12 years of litigation, it was bankrupt.[8]

The cost-saving benefits of the FCC's expeditious regime redound to the utilities, cable operators, and the Commission. The time-saving benefits are especially valuable in today's

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[7] *Insight Communications Company*, DA 95-2334 (Nov. 13, 1995) (small system average is 35.3 homes per mile, while large system average is 68.7 homes per mile).

[8] *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. 1981).

highly competitive arena, when delays in attachments by cable operators and CLECs may determine whether or not consumers have a choice among telecommunication providers.

B. The Pole Formula Has Been Adopted Wholesale By Certified Jurisdictions And Has Withstood Repeated Challenges On The Identical Bases Again At Issue Here

To date, the Commission has remained steadfast to the original design of pole attachment proceedings. Now that Congress has extended the Pole Act's reach to other facilities-based competitors, its ability to enhance competition is even greater. With electric utility diversification into communications, and ILEC diversification into video, the need for strict adherence to this model never has been greater.

The Commission need not look far for validation of the regime it has adopted. The leading certified state PUCs[9] have adopted the FCC formula intact. California is certified, but adopts the FCC's formula and usable space ratio—7.41%.[10] Ohio adopted the FCC formula intact after months of hearing.[11] In 1995, the Michigan legislature adopted the FCC formula for all attachments on all poles owned by telecommunications competitors;[12] in 1997, the Michigan PSC adopted the FCC formula for all electric utilities, whether or not they were currently diversified.[13] New York adopted the FCC formula in 1997, explaining that using the FCC's rate

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[9] The Pole Act allows States to preempt FCC jurisdiction over pole rent disputes and resolve them at the State PUC. Certified States are provided discretion to adopt a different formula, so long as they consider the interests of all parties, resolve cases quickly, and use a publicly available methodology. *See, e.g.*, 47 U.S.C. § 224(c)(2).

[10] Cal. Pub. Util. Code § 767.5 (1996).

[11] *Ohio Edison Co. et al.*, No. 81-1171-EL-AIR (Nov. 3, 1982).

[12] Michigan Telecommunications Act of 1995, MCL 460.6; MSA 22.13(6g).

[13] *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending, Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997). A copy of these Michigan Public Service

and access standards would promote competition and assist telecommunications providers in deploying telecommunications facilities seamlessly across state lines.[14] A petition is pending in Washington State to take the same approach there.[15]

The formula, moreover, repeatedly has been considered and re-validated by Congress in 1983, when it lifted the formula's five-year sunset provision contained in the original version of Section 224;[16] in 1984, when it amended Section 224 as part of the sweeping Cable Communications Policy Act of 1984 but left the formula intact;[17] in 1992, when it passed the Cable Competition and Consumer Protection Act;[18] and in 1996, when it passed the Telecommunications Act of 1996 and retained the formula.[19]

Commission rulings are included at Exhibit 1.

[14] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997). (Ex. 2). In this opinion issued just last week, the New York State Public Service Commission stated that it:

> will use the federal approach as our model for setting pole attachment rates and regulating pole attachment operations in New York. Since the enactment of the Telecommunications Act of 1996, there has emerged a clear need for cooperative federalism in this and other areas of telecommunications so as to provide consumers the full benefits available from the development of competitive markets.

Id.

It is this rate and operations approach that has fostered the development of competitive communications networks that the utility pole owners seek to disrupt through this and other proceedings. *See* Section I.C., *infra.*

[15] *Petition for Rulemaking by TCI Cablevision of Washington, Inc.*, No. UT-970723(R) (Wash. Util. and Transp. Comm'n. filed April 30, 1997).

[16] Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983).

[17] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[18] Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[19] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

C. The Utilities Seek To Use This Proceeding In Their Current Multi-Front Campaign Against Just And Reasonable Pole Attachment Regulation

Certain pole owners periodically launch attacks on pole regulation, particularly as they diversify into communications ventures. Today, for example, certain electric utilities are:

- attacking the constitutionality of the Pole Act;[20]
- imposing new kinds of "administrative" fees and penalties associated with poles;[21]
- baseless attempted interventions to forestall the resolution of the numerous pole and pole access complaints now pending before the Bureau;[22]
- by demanding that CLECs and cable operators surrender their federal rights despite a specific Bureau ruling to the contrary.[23]

Now, utilities are asking the Commission to re-open the long-settled formula in this proceeding to increase rents that already are set at the upper-most end of the range allowed by Congress.[24]

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[20] *Gulf Power, et al. v. United States of America*, Civ. Act. No. 3: 96CV381/LAL (N.D. Fla. filed Feb. 21, 1997).

[21] *Fanch Cablevision of Colorado, L.P.*, PA Nos. 97-003, 97-004 (filed Apr. 4, 1997).

[22] *See, e.g., Tennessee Cable Telecommunications Ass'n, et al. v. BellSouth Telecommunications, Inc.*, PA No. 96-004, Intervention Motion and Memorandum of Commonwealth Edison Co.; Duke Power Co.; and Northern States Power Co. (filed Mar. 25, 1997); *Texas Cable & Telecommunications Association v. GTE Southwest Incorporated*, PA No. 96-006, Intervention Motion and Memorandum of Commonwealth Edison Co.; Duke Power Co.; and Northern States Power Co. (filed May 9, 1997). We also note that diversifying electric utilities are actively undermining the Commission's efficient design of three-pleading pole attachment cases into protracted, expensive, time-consuming agency litigation at a time when cable operators and others can afford neither the time nor financial resources required to undertake such litigation. *Fanch Cablevision, et al. v. Public Serv. Co. of Colorado*, PA Nos. 97-003 97-004, Respondent's Answer (filed May 19, 1997) (electric utility requests adjudicative hearing or full briefing in direct violation of pole attachment complaint procedures).

[23] As noted in Section VI, electric utilities continue to insist upon waivers as conditions to access, despite a specific ruling that this is unlawful. *See* Letter from Meredith J. Jones, Chief, Cable Services Bureau, to Danny E. Adams, Esq., DA 97-131 at 1 (Jan. 17, 1997); *See infra* Section VI, n.115.

[24] 47 U.S.C. § 224(d)(1). The fully allocated rate has not been without its critics. Some commentators note that makeready payments are already priced at incremental costs (when it suits the utilities) and question why recurring pole attachment rents should not be priced at incremental costs, as are other essential facilities needed in interconnection, rather than being set at the upper end of maximum fully distributed cost.

They pursue this course while moving aggressively into telecommunications and video services.[25]

II. PROPOSED ADJUSTMENT TO POLE SPACE ALLOCATIONS

The electric utility "White Paper" raises three claims relating to usable space on which the Commission is seeking comment. First, the utilities claim that the height of the average utility pole has increased in size since the Commission last visited the issue. Second, they claim that the usable space on such poles has decreased. Third, they claim that 30' poles are no longer suitable for joint use, and should be eliminated from the calculation of pole rents.

We can concur that the average height of poles has increased, for reasons on which the utilities conspicuously are silent. But it is inherently self-contradictory and factually incorrect to claim that the corresponding amount of usable space is *decreasing*. It is also incorrect to assert that 30' poles are not susceptible to joint use.

A. Usable Space Has Increased On Utility Poles, Not Decreased As The Utilities Claim

Poles do appear to be "growing" as the utilities claim. When the Commission adopted its presumptions in 1979, it was fair to conclude from the record that poles used for

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[25] *See, e.g.* Alan Breznick, *Charged Up, Electric Utilities Seeing Bright Prospect in Building Broadband Networks,* Cable World, May 20, 1996 at 8. This trend led one electric industry spokesman to comment recently that "[t]here are some utilities that are going to invest very aggressively in telecommunications, and they are going to surprise a lot of people with their speed and determination." Lane Cooper, *Utilities Open the Door on a New Market -- Law Entices Gas and Electric Companies Into Telecommunications*, Communications Week, T33 (Oct. 28, 1996) (Comments of UTC (electric utility trade association) counsel, Sean Stokes). Even prior to the passage of the 1996 Act, single-state electrics, exempt from Securities and Exchange Commission ("SEC") prohibitions on telecommunications ventures, had already begun to offer such services. Numerous utilities which have never been restricted by the Public Utility Holding Company Act ("PUHCA"), including Baltimore Electric & Gas, Duke Power, Montana Power Company, and Pacific Gas and Electric, are now providing communications services. With the lifting of PUHCA restrictions under the 1996 Telecommunications Act, this Commission began receiving applications from electric utilities scarcely two months after the passage of the 1996 Act. *See, e.g., Applications of Entergy Technology Holding Co.*, File Nos. ETC-96-2; ETC-96-3 (Apr. 9, 1996); CSW Communications, *Application of CSW Communications*, File No. ETC-96-1 (Apr. 4, 1996). The stream of such applications continues unabated to this day. *See, e.g., Application of EUA Telecommunications Corp.*, File No-ETC-97-7 (May 23, 1997); *Application of Entergy ETHC Merger Co.*, File No. ETC-97-8 (May 23, 1997); *Application of Sonitrol Southeast, Inc.*, File No. ETC-97-9 (May 23, 1997).

cable attachments were evenly split between 35' and 40' poles. When later subjected to review, the Commission confirmed the presumption through study of four pole surveys conducted under state PSC auspices.[26]

The most recent evidence of pole height of which we are aware comes from surveys and continuing property records of electric utilities in Michigan and New York, compiled as part of the very recent pole attachment rate/methodology proceeding in those two states. Attached as Ex. 3 is a study, based on materials produced by electric utilities in these two state proceedings, showing the aggregate average pole height of three major electric utilities in two different jurisdictions to be 40.17 feet.[27]

The reason that pole heights are increasing is to allow electric utilities to send higher power loads along distribution routes into increasingly populated areas.[28] Ground clearance requirements for electrical conductors increase as the size and electrical current carrying capacity of those conductors increase. That is, the higher the voltages carried on an electric wire, the higher that wire must be above the ground. These taller poles tend to cost more than shorter poles. Thus, coincident with the installation of taller poles, the average net investment for electric poles has risen relative to telephone poles.[29] The fact that new construction costs are

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[26] *Petition to Adopt Rules Concerning Usable Space On Utility Poles*, 56 R.R.2d 707, 711 (1984).

[27] Ex. 3.

[28] *Consumers Power, et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831, Direct Testimony of Victor Gates, Plant Engineering and Construction Witness of Michigan Cable Telecommunications Association at 15 (citing discovery response of Edison Sault Electric Company (MCTA-ES-10831-30), which stated that its electric service upgrade from a 25kV to a 35kV system required the changeout to taller poles).

[29] For example, attached to these comments are pole attachment rate calculations which show that the average net per-pole investment of a Michigan major electric utility (Detroit Edison) is nearly six times that of the primary local telephone company (Ameritech) operating in the same state. *See* Exs. 4 and 5.

rising also indicates that electric utilities are installing taller poles. Finally, while in the past joint use arrangements between telephone and electric utilities generally divided the number of poles owned by each more-or-less evenly, telephone companies are migrating away from joint ownership and leaving electrics to set these taller, more costly poles for electric use.

Pole height is directly related to usable space. Under the National Electrical Safety Code ("NESC") which prevailed until 1990,[30] a pole could be assumed to need 6' for ground set and 18' to minimum grade clearance, leaving 11' of usable space on a 35' pole and 16' of usable space on a 40' pole.[31] Because of the assumption that poles were evenly split between 35' and 40' poles, the presumption was that a pole has 13.5' of usable space (the simple average of 11' and 16'). Any utility is permitted to rebut the presumption for its own rate development with evidence from its own pole plant, generally depending on recourse to internal records. If poles are now 40', the most expedient and accurate way to account for this change—in a manner which conforms with FCC practice—is for the Commission to adopt a rebuttable presumption that there exists 16 feet of usable space on electric utility poles.[32] Because cable is assigned one foot of space, the allocation would be 1/16 of the applicable costs, or 6.25%.[33] Such an adjustment

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[30] Attachments made under these prior Codes are still governed by these codes until the pole is rearranged or renewed. *See* National Electric Safety Code Section ("NESC") O.13B.2 ("Existing installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority").

[31] In 1990, the NESC changed to permit a minimum ground clearance of 15.5'.

[32] This position finds support in the recent pole rate decision of the Michigan Public Service Commission, which found an average pole height of poles with cable TV attachments of 40.8 feet, and usable space of 15.4 feet. *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), *reh'g denied* (April 24, 1997). Ex. 1.

[33] The Pole Act defines "usable space" as "the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment." 47 U.S.C. § 224(d)(2). The usable space on utility poles is that space above the lowest point of attachment on the pole, which is presumed to be 18 feet, to the top of the pole. Assuming six feet for below-ground set, and 18 feet to the first communications attachment, on a 40-foot pole

would be particularly equitable, because cable operators have long been paying for the greater investment which electric utilities have been making in these taller poles, without receiving the reciprocal right to have space calculated in accordance with the height of those poles.

B. The Utilities' Claim Of Decreased Usable Space Is Yet Another Attempt To Reassign the Neutral Zone To Attaching Parties

The utilities' claims that usable space is decreasing is not at all consistent with FCC practice, as claimed in the White Paper.[34] Instead, the utilities are arguing that the calculation of usable space should be fundamentally changed to exclude the neutral zone. This is a re-hash of long-discredited arguments that the neutral zone is unusable and should not be directly assigned to the electric utilities.

The NESC prescribes a so-called "neutral zone" of 30 - 40 inches between a communications conductor and the first horizontal electrical conductor.[35] In 1979, the FCC concluded that the neutral zone is usable space and that no portion of it may be attributed to cable.[36] The utilities' claim that the neutral zone is unusable has been rejected, time and again. It was rejected first in CC Docket 78-144; then in the *Monongahela Power* case;[37] then again before the Commission in a 1984 rulemaking;[38] in subsequent litigated cases;[39] in state pole

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there would be 16 feet of usable space.

[34] White Paper at 10.

[35] Under current NESC specifications, the neutral zone may be only 30 inches, instead of 40 inches, where the top communications facility and the electric facilities are bonded to a common ground. *See* NESC Rules 235C1 (Exception 3), 235C2b(1)(a), and 235C2b(3).

[36] *Rules for the Regulation of Cable Television Pole Attachment*, Mem. Op. and Second Report and Order, 72 F.C.C.2d 59, 70 (1979).

[37] *Monongahela Power Co., et al. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

[38] *Petition to Adopt Rules Concerning Usable Space On Utility Poles*, 56 R.R.2d 707, 710 (1984).

attachment proceedings[40] and in Congress' repeated reaffirmation of the pole attachment formula in 1983,[41] 1984,[42] 1992,[43] and 1996.[44] It was rejected again in 1997 in Michigan and New York.[45]

There are sound operational and economic reasons for assigning the neutral zone directly to the electric utilities in this fashion, and there have been no changes in pole plant, electric plant, communications construction practices or anything else that would warrant departure from this assignment.

First, the neutral zone does not exist for the benefit of communications attachments. It does not exist on poles used solely for cable or for cable and telephone. The neutral zone exists only for electrical attachments which must maintain a prescribed distance from all conductors of differing voltages and applications. Pole space used by a power company to maintain prescribed clearances among conductors is "used" by the power company for the unique attribute of ***its*** core services. This is why electric utilities allocate all of the space separating

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[39] *General Television of Delaware, Inc. v. Diamond State Telephone and Telegraph Co.*, PA-84-0015, Mimeo No. 2141 (Jan. 28, 1985); *El Paso Cablevision, Inc. v. Mountain States Telephone & Telegraph Co.*, 49 R.R.2d 847 (1981).

[40] *See, e.g., In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997); *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), *reh'g denied* (April 24, 1997); *Ohio Edison Co., et al.*, No. 81-1171-EL-AIR (Ohio Pub. Serv. Comm'n Nov. 3, 1982); Cal. Pub. Util. Code § 767.5 (1996).

[41] Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983).

[42] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[43] Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[44] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[45] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997). (Ex. 2).

electrical conductors from one another as "usable" space actually used by power.[46] The neutral zone is identical conceptually to separation among electrical conductors on the pole, which is usable and used by electric utilities. Just as the separation space among electrical operators on the pole is deemed to belong to electric, so too must the neutral zone; it is used only to separate electric facilities from conductors of differing voltages and applications.

Second, the neutral zone is space required by electric companies to maintain their own minimum clearances above grade. While under the NESC communications conductors may be placed to cross highways at 18 feet, electrical utilities must cross at 22 feet.[47] That extra space above the point of minimum communications attachments is the identical space which the electric utilities are attempting to assign to cable and their other competitors.

Third, the neutral zone is not "dead space" unusable for any other purpose. The neutral zone can be, and is, used for street light attachments, from which electric utilities derive additional revenues.[48]

These are among the reasons that the FCC formula specifically assigns the neutral zone as usable space used by electric utilities.[49]

Nothing has changed that justifies reassignment of the neutral zone to other

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[46] *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), *reh'g denied* (April 24, 1997) (Ex. 2).

[47] NESC Table 232-1.

[48] *See, e.g., Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831, Tr. 409 (Cross examination of Glenn R. Spence, Detroit Edison outside plant engineering witness); Tr. 520 (Cross examination of John A. Zagancyk, Wisconsin Electric Power witness). *See also* Ex. 6 (pole attachment agreement appendices which show street lights positioned in neutral zone).

[49] *Rules for the Regulation of Cable Television Pole Attachment,* Mem. Op. and Second Report and Order, 72 F.C.C.2d 59, 70 (1979).

attaching parties. If there has been any change in circumstances at all, it has been that the neutral zone now has become even *more* vital to the provision of electric service. Because of electric utilities' need to rack higher power conductors along their distribution routes to reach new suburbs, they need the extra height themselves.

Thus, there is no basis for reducing usable space in the pole formula.

C. There Is No Basis To Exclude Thirty-Foot Poles From Rate Base

The third claim relating to usable space is that 30' poles are no longer suitable for attachment and should be excluded from the pole calculation. This is wrong in premise and in its recommendation that 30-foot poles be removed from rate base.

First, existing attachments are still made to 30' poles. The fact that electric utilities are installing taller poles to accommodate their increased electric service requirements does not mean that thirty foot poles are no longer used for third-party attachments. The Commission has specifically found that cable operators are attached to significant numbers of 30' poles.[50] Our own sampling of poles indicates that in areas of the country as diverse as New York and Texas, cable operators are still attached to significant numbers of 30' poles.[51] This is true, in part, because significant numbers of distribution poles in many parts of the country run along the back boundaries of residential property lines where clearances are reduced due to the absence of road crossings and vehicular traffic. Indeed, as set forth in the attached Declaration of John R.

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[50] *See, e.g., Capital Cities Cable, Inc., et al. v. Mountain States Telephone & Telegraph Co., et al.*, PA-81-0026 (June 29, 1984) (plaintiffs attached to over 6,000 30-foot poles); *Booth American Co. v. General Telephone Co. of Florida*, PA-81-0067 (Aug. 2, 1983) (plaintiff attached to 181 30-foot poles); *Williamsburg Cablevision v. Carolina Power & Light Co.*, PA-81-0007 (Jan. 1, 1983) (plaintiff attached to over 1,300 30-foot poles).

[51] Attached hereto as Exhibit 7 is a chart showing the results of a pole audit performed in Texas, covering nearly 1,300 poles. The audit revealed that in one community, 30 foot poles constituted 15% of all poles, and of all the poles counted in the survey nearly 10% were 30 foot poles.

Eiseman, one cable operator in only two of its systems is attached to approximately 5,000 poles 30 feet or lower in height, all 5,000 of which are used by multiple parties.

Additional confirmation lies in the utilities' own records produced in discovery in recent state pole attachment proceedings. These records show that poles 30 feet and below comprise, on average, more than 21% of the pole network, with at least one utility's (New York Telephone) having 30 feet or less comprising nearly 50% of that utility's entire pole inventory.[52]

Second, no changes have caused the abandonment of 30' poles from joint use. We are not aware of any changes in the nature of third-party attachments which would justify the utilities' proposal to eliminate 30-foot poles from rate base. The NESC has changed, but the 1990 edition of the NESC allowed for the *lowering* of mid-span above-grade clearance for road crossing from the previous 18-foot level to 15.5 feet. Historically, telephone companies always have been the lowest line user of the pole. Ameritech, now that it is entering the cable television business, has interpreted the 1990 NESC amendment to mean that the space *below telephone* is now available for attachment of cable lines.[53] If this construction practice is correct, then an additional point of attachment in the communications space has been created, potentially placing even greater numbers of 30-foot poles into service for third-party attachments.

Third, some utilities have been attempting to treat all stub (also called "lift,"

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[52] *See, e.g.,* Exhibit 8 which contains copies of utility discovery responses produced in recent state pole attachment proceedings. For example, these materials show that New York Telephone (NYNEX) alone owns over 283,000 poles 30 feet or less in height, or 46% of the 611,502 of the total poles it solely owns. Similarly, two electric utilities in Michigan own more than 151,000 poles of this size. In addition, Exhibit 8 also shows that the upstate New York electric utility Niagara Mohawk Power Company solely owns over 74,000 poles 30 feet or shorter. This very small sampling conclusively demonstrates that 30-foot or smaller poles comprise a substantial part of a utility's pole plant inventory and for this reason alone should not be eliminated from rate base.

[53] *See Ohio Cable Telecommunications Ass'n v. Ameritech Ohio*, Case No. 96-1027-TP-CSS (Ohio Pub. Util. Comm'n Apr. 17, 1997).

"drop," or "service") poles as compensable pole attachments for the first time.[54] Some utilities simply have included drop poles for future billings, while others have tried to impose retroactive "unauthorized attachment" penalties (in a departure from decades of practice).[55] Regardless of the resolution of such disputes, the utilities cannot have it both ways. Drop poles are almost always 30 feet or less in height. If cable operators and others are billed for attachment to such poles, they must be included in rate base.

Fourth, the solution proposed by the utilities would frustrate the operation of the

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[54] *See Fanch Cablevision, et al. v. Public Serv. Co. of Colorado*, PA Nos. 97-003 and 97-004 (filed April 4 1997). Service poles (known to some as "drop" or "lift" poles) are poles which operators occasionally use when installing long drops to a subscriber. Typically, installers will not go through makeready clearance procedures when connecting a subscriber. It has been the custom in much of the industry not to treat drop wire attachments to service poles as chargeable "pole attachments."

There are key differences between *distribution* and *service* poles which are evident from all of the terms of the standard utility pole attachment agreement and from industry convention. Distribution poles are routinely inspected, rearranged, and cleared for attachment of current-carrying coaxial cable. Attachments are pursuant to individual licenses which are issued prior to the completion of construction of the coaxial distribution system. All of the makeready and licensing provisions of the contract are designed with these distribution poles in mind. By contrast, service poles are used for attaching non-current-carrying subscriber drops, which are subject to minimal clearance requirements. The attachment of subscriber drops is subject to an entirely different timetable than construction of the distribution system. Construction of the distribution system is a major, one-time construction activity which is completed with the prior coordination of the utility. Some construction delay to accommodate the prior clearance procedure is expected and planned for. Indeed, it is contemplated in cable television franchise agreements. By contrast, installation of a subscriber drop must immediately follow the ordering of cable service by a new subscriber, for business reasons and under most franchise agreements, and FCC rules. 47 C.F.R. § 76.309(c)(2)(i) (cable operators required to fulfill requests for cable service within 7 days). It would be impossible to run a cable television system if clearance delays were encountered prior to hooking up each customer as those customers ordered service through the life of a system.

It is because of these distinctions between distribution and drop poles that utilities have either exempted drop poles from the payment schedule or provided for alternative methods of clearance and collection.

[55] In one case now pending before this Commission, one electric utility sent certain cable operators a bill for approximately $500,000 for "unauthorized attachments," 60% of such attachments which were for stub poles for which the utility never had attempted to bill the operators in the past. This "bill" only came after the utility forced the cable operator to sign a new pole attachment agreement which quintupled and already unlawful $50.00 per pole unauthorized attachment fee to $250.00 on claims that the new penalty was needed as an deterrent to unauthorized attachments. The utility, however, never had attempted to impose the previous $50.00 penalty on the operators revealing the utility's "reason" for the new rate to be the fabrication that it is. *See Fanch Cablevision, et al. v. Public Serv. Co. of Colorado*, PA Nos. 97-003 and 97-004 (filed April 4 1997).

current pole regulatory regime. The utilities ask that 30' poles be removed from rate base and from the pole count. Today, utilities report pole investment in the aggregate in Account 364. They produce a pole count figure from continuing property records. Not all utilities maintain a breakdown of poles by height and investment.[56] There is no means of removing 30' investment based upon public information. Instead, every rate calculation would require disaggregation of an aggregate account, and resort to internal records which tie to no publicly filed report. Even if the utilities maintained detailed data on the cost of 30' poles deployed in their network, the introduction of that data would require the very kind of detailed verification and authentication process and discovery that the Commission wisely has avoided. Any proposal that would allow pole owners to extract 30' poles from rate base would be an invitation to contention and complexity where none has existed in the past, and would inject delay, expense and uncertainty into every case in the pole rate setting process.

It appears to us that the sole reason that the utilities seek to eliminate 30' poles from rate base is to increase rate base. Thirty-foot poles are cheaper to purchase and install than taller poles. For example, New York Telephone has claimed that the purchase price (not including installation costs) for a 30' pole is $140.92, and for a 25' pole is $81.72, while the price of 40-foot and greater poles is $266.34.[57] By removing these 30' poles from the calculation, the

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[56] For example, in recent pole attachment proceedings before the Michigan and New York Public Service Commissions, of the 16 total electric and telephone utilities participating in both of those two proceedings, only a small handful produced responses (despite the submission of an oral hearing on motions to compel) indicating pole height, let alone responses of book investment of each class of pole. Allowing the utilities the opportunity to attempt to disaggregate 30-foot poles from rate base before this Commission would be an invitation to protracted and entirely unnecessary discovery disputes—disputes which the pole adjudicatory regime was specifically designed to avoid.

[57] *See* Ex. 9. New York Telephone estimates the *installed* price of 30', 35' and 40' poles to range from $910 - $945; $970 - $1032; and $1082 - $1117, respectively, depending on the population density of the area in which the pole is installed. Ex. 10.

average investment per pole would increase, substantially inflating pole rents without justification.

III. PROPOSED ADJUSTMENT TO RATE BASE

The utilities have proposed a number of changes to the way in which the formula calculates the pole rate base which should be rejected.

A. Grounding Systems Should Not Be Included In Ratebase

In keeping with long-standing Commission precedent,[58] grounding systems should be excluded from rate base because, like cross-arms and appurtenances, they are part of the electric utilities' system of conductors, rather than of poles.[59]

Grounding involves installing a conductor and ground rod to discharge power surges or to discharge induced current. Under many pole attachment agreements, cable operators are required to attach their facilities to the electric company ground. Because of this requirement, the electric utilities, apparently, assume that this attachment makes the entire utility grounding system of equal use to cable companies and to the electric utility. That assumption is wrong.

Each attaching party is responsible for grounding its own system of conductors. When cable creates its own grounding system, it grounds only to approximately the first, last and tenth pole in a pole line, at a far lower cost than is required for electrical conductors. These

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[58] *See, e.g., Williamsburg Cablevision v. Carolina Power and Light Co.*, PA 82-007, FCC Mimeo 1961 (Jan. 26, 1983); *American Television and Communications Corp. v. Wisconsin Power & Light Co.*, PA No. 82-006, Mimeo 1678 (Jan. 4, 1985).

[59] In some language at note 55 of the *Notice* the Commission suggests that the costs of grounding systems may be included in FERC accounts currently used to calculate electric utilities' pole attachment rates. Asset accounts 364, 365, and 369 are used to calculate the maintenance component of the carrying charge. However, Account 364, reduced by 15% to account for appurtenances, is used as the pole rate base. The White Paper is suggesting that the grounding and arrestor systems booked to Account 365 should be added to this rate base. For the reasons set forth in this section, they should not be.

practices are based on long-standing communications industry outside plant construction practices.[60] In addition, cable operators also ground their facilities both on the poles to which they have attached active electronic components, and, on the two poles immediately adjacent to those poles on which the actives are located. Even if cable also bonds to the utility's ground, cable must install its own grounding systems to ground its own active electronic components because existing power company grounding systems are ***not*** sufficient to ground these system components. In reality, while cable will bond to a power company ground because of requirements in pole license agreements, the electric utilities are not satisfying cable's own grounding needs. The fact that electric utilities require cable operators to bond to electric grounding systems should not be the basis on which to assign an equal share of a utility grounding system.[61] The Michigan Public Service Commission specifically found that the electric utilities' grounding systems should *not* be included in a cable operators' pole attachment rate. *Consumers Power Co., et al.*, Case No. U-10831 at 23.

The FERC confirms this view. FERC regulations classify grounding systems as part of a utility's system of conductors, recorded to Account 365 rather than as being any part of Account 364, which comprises pole plant and appurtenances such as crossarms.[62] Thus, under

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[60] *See* BellCore Manual of Construction Practices § 10 (1989 ed.) ("BellCore Bluebook"); Declaration of John Pietri ¶ 9 (hereinafter "Pietri Decl.").

[61] Pietri Decl. ¶¶ 9 - 10. In isolated circumstances where there is a mutually recognized benefit to the cable operator of using the pole owner's grounding systems, cable operators the utility have agreed to inclusion of a portion of grounding systems in rate base. *See Teleprompter Corp. v. Alabama Power Co.*, PA No. 81-014 FCC 83-500 (Nov. 3, 1983). These few instances of inclusion of some portion of grounding costs may be appropriate, however, they in no manner merit a generally applicable Commission ruling that the costs of grounding systems should be included in the pole rate as a matter of course.

[62] The FERC description for Account 365 reads: "[t]his account shall include the cost installed of overhead conductors and devices used for distribution purposes, "including . . . [g]round wires, clamps, etc." 18 C.F.R. Part 101 (Account 365) (1995). The description for Account 364 reads: "This account shall include the cost installed